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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JAY PRINTZ, Sheriff/Coroner, Ravalli County, Montana;
SHERIFF RICHARD MACK, Graham County, Arizona,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE, LAW ENFORCEMENT ALLIANCE OF AMERICA

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89 pp

INTEREST OF THE AMICUS CURIAE

The Law Enforcement Alliance of America (LEAA) is a not for profit corporation, organized under the laws of the Commonwealth of Virginia. It has approximately 50,000 members, 85% of whom are sworn law enforcement officers. Some of these are Chief Law Enforcement Officers (CLEOs) under the terms of the Brady Act. Others will be designated to act in the place of the CLEO. In their capacity as law enforcement officers, LEAA members will be directly affected by the provisions requiring ministerial acts of CLEOs. Sheriff Richard Mack, one of the Appellants in this case, has been a member of LEAA for many years.

Further, most LEAA members are gun owners, and are directly affected by issues touching upon the private ownership of firearms.

THE QUESTION PRESENTED

Whether the delegated powers of Congress, as construed in *New York v. United States*, 505 U.S. 144 (1992), include the power which Congress exercised in the Brady Law, 18 U.S.C. §922(s)(2), (6)(B) and (C), to prescribe duties for state Chief Law Enforcement Officers (CLEOs), beyond those duties prescribed in the state laws which created their positions, including compelling the CLEO to make a reasonable effort to ascertain whether individuals may lawfully purchase handguns; thereafter to destroy the records of such transaction, or to provide a written explanation for an adverse determination.

TABLE OF CONTENTS

Page

Interest of the Amicus Curiae i

The Question Presented ii

Table of Contents iii

Authorities Cited iv

Statement of the Case 1

A. *Position of the Amicus* 1
B. *Background of the Litigation* 2

Argument:

I. THE BURDEN WHICH THE BRADY LAW IMPOSES UPON CHIEF LAW ENFORCEMENT OFFICERS VIOLATES THE PRINCIPLES OF FEDERALISM 7

II. THE BURDEN WHICH THE BRADY LAW IMPOSES UPON CHIEF LAW ENFORCEMENT OFFICERS VIOLATES THE 10TH AMENDMENT 15

III. THE BACKGROUND CHECK PROVISIONS ARE NOT SEVERABLE FROM THE REMAINING PROVISIONS OF THE ACT 21

Conclusion 21

AUTHORITIES CITED

Cases **Page(s)**

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 18

Kentucky v. Dennison, 65 U.S. (24 How.) 66, 108-09 (1861) 13

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 21

Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) (FERC) 18-20

Frank v. United States, 78 F.3d 815 (2d Cir. 1996) 1

Fry v. United States, 421 U.S. 542, 547 (1975) 16, 18

Heart of Atlanta Hotel v. United States, 379 U.S. 241, 262 (1964) 16

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, at 288 (1981) 18

Koog v. U.S., and *McGee v. U.S.*, 79 F.3d 452 (5th Cir. 1996) 1, 17

Mack v. U.S, 66 F.3d 1025 (9th Cir. 1995) 1, 9

New York v. United States, 505 U.S. 144 (1992) ..... passim

Cases **Page(s)**

Printz v. U.S. , 66 F.3d 1025 (9th Cir. 1995) 1

Puerto Rico v. Branstad, 483 U.S. 219 (1987) 14

South Carolina v. Baker, 485 U.S. 505 (1988) 18

United States v. Cruikshank, 94 U.S. 542 (1875), at 550 15

United States v. Jackson, 390 U.S. 570 (1968) 16

Constitutional Provisions

U. S. Const., Art. I, §9 10

U. S. Const., Art. IV, §2 14

U.S. Const., Art. I, §8 13

Regulations

Attorney General Order No. 1853-94, 59 Federal Register 9498 (Feb. 28, 1994) 3

Statutes and Rules

18 U.S.C. §922(n) 2

18 U.S.C. §922(d) 2

18 U.S.C. §922(g) 2

Statutes and Rules

18 U.S.C. §922(s) ..... passim

18 U.S.C. §924(a)(5) 4, 6

18 U.S.C. §925A 3

Legislative History

H.R. Rep. No. 103-344, 103rd Cong., 1st. Sess., at 7 (1993) 4

Hearings on S. 1030 before the Senate Judiciary Comm, 97th Cong. 2d Sess. at 60-62 (1982) 5

Subcomm. on the Constitution, Sen. Judiciary Comm., The Right to Keep and Bear Arms 97th Cong. 2d Sess. at 22 (1982) 5

Treatises

B. Bailyn, *The Ideological Origins of the American Revolution*, (1967), at 198-229 8

B. Schwartz, *A History of the Supreme Court*, (1993) 27-28, 73 12

C. Rossiter, *The Political Thought of the American Revolution*, ch. 10 (1963) 8

C.F. Adams, ed., 4 *Memoirs of John Quincy Adams* 502 (1876) 14

D. Matteson, *The Organization of the Government Under the Constitution*, 296-303 (1943, reprinted 1970) 12, 14

Treatises

E. Morgan, "The American Revolution Considered as an Ideological Movement," in *Causes and Consequences of the American Revolution*, 172, 178-79, (1966) 9

Federalist No. 20, at 138 9

Federalist No. 36 11

Federalist No. 42 (Madison) at 269-70 13

Federalist No. 46 (Madison) at 294 (C. Rossiter, ed. 1961) 9

Fugitive Slave Acts, *Brief of the United States* at 16, n.13 14

J. Bryce, 1 *The American Commonwealth*, (1888), at 318 7

J. Story, *A Familiar Exposition of the Constitution of the United States*, (1840), at 216 15

The Federalist No. 45 (Madison) at 292-93 (C. Rossiter, ed. 1961) 8, 10, 11

STATEMENT OF THE CASE

A. Position of the Amicus.

The question presented in this case has been reviewed in three Circuits. The Ninth Circuit, in *Mack v. U.S.*, and *Printz v. U.S.* , 66 F.3d 1025 (9th Cir. 1995), and the Second Circuit, in *Frank v. United States*, 78 F.3d 815 (2d Cir. 1996), each held that the duties which the Brady law compels Chief Law Enforcement Officers (CLEOs) to perform did not violate the 10th Amendment, or exceed the delegated powers of Congress. On the other hand, the Fifth Circuit, in *Koog v. U.S.*, and *McGee v. U.S.*, 79 F.3d 452 (5th Cir. 1996), held that the interim duties, including the duty to perform a background check, the destruction of records and the duty to furnish written justification for denials, violate the constitution.

The Law Enforcement Alliance of America (LEAA) supports the position of the Appellants, Sheriff Mack and Sheriff Printz. We believe that the Brady Law is unconstitutional. It is not a command from a sovereign power to all who owe a duty of obedience to it. Rather, it is a set of commands from one sovereign, which are addressed to officers who are commissioned and set in place by a separate and distinct sovereign. Obedience to these commands, by those to whom they are addressed, is contemplated precisely because of their character as servants of a separate sovereign. The Act provides criminal penalties for officers who fail to put forth a "reasonable effort" to obey its commands, without providing any guidance as to what might be considered "reasonable." In sum, it is a law of doubtful constitutional pedigree which threatens law enforcement officers with criminal penalties for failure to meet an unknown standard of performance.

B. Background of the litigation.

Federal law prohibits the transfer of firearms to, or possession by, members of certain classes of restricted persons, including, *inter alia*, convicted felons, persons dishonorably discharged from the armed forces, adjudicated mental defectives, illegal aliens, unlawful drug users, fugitives from justice, and persons under certain forms of domestic restraining orders. 18 U.S.C. §922(d), (g), & (n).

In 1993 Congress enacted the "Brady Law," Pub. L. 103-159, 107 Stat. 1536 (1993), which provides for an official verification, through an examination of available records, of the proposed purchaser's eligibility to possess a firearm. To this end, the law requires the U.S. Justice Department to establish a data base of prohibited persons by the year 1999. Before that time, the law creates an interim system which requires that the background investigations, on persons seeking to purchase handguns, be conducted by the "Chief Law Enforcement Officer" (CLEO) for the district in which the proposed purchaser resides. The phrase "Chief Law Enforcement Officer" is defined, at 18 U.S.C.§922(s)(8), as "...the chief of police, sheriff, or an equivalent officer or the designee of any such individual." None of these offices are created under the Federal Constitution, and none of these officers are servants of the Federal Government. LEAA estimates there are approximately 18,500 local and state police agencies in the United States. In addition, according to the National Sheriff's Association, there are 3,095 Sheriff's. Thus, the statute purports to cover approximately 21-22 thousand individuals as Chief Law Enforcement Officers (CLEO).

During the operation of the interim system, the proposed purchaser must fill out a form indicating an intent to purchase a handgun. The dealer must submit this information to the Chief Law Enforcement Officer of the place where the proposed purchaser resides. 18 U.S.C. §922(s)(1)(A)(iii). The CLEO is required to make ". . . a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. §922(s)(2). The U.S. Attorney General has designated two Federal databases as the "national system" which the CLEO must check. Order No.1853-94, at 59 *Federal Register* 9498 (Feb. 28, 1994).

If the CLEO finds that the proposed sale would not violate Federal, State or local law, he is required to destroy the form and any references to it within twenty business days. 18 U.S.C. §922(s)(6)(B). On the other hand, if the CLEO finds that the proposed purchaser is ineligible to receive a handgun, he must inform the dealer and, if the purchaser requests, provide a written justification of his findings within 20 business days. 18 U.S.C. §922(s)(6)(C). Should the CLEO err in barring a purchase, the statute creates a Federal cause of action against his jurisdiction for correction and recovery of attorneys' fees. 18 U.S.C. §925A.

The Act does not define "reasonable effort." At a minimum, a "reasonable effort" must include a search of the two Federal databases, as well as any state and local records which might be available. Further, there are some disqualifying conditions which would be difficult, if not impossible, for a CLEO to discover. For example, LEAA is

not aware of any system of records, whether accessible to law enforcement officers or not, of people who have ever renounced U.S. citizenship. LEAA does not believe that there is a registry of individuals who have received dishonorable discharges from the armed forces. Is the CLEO expected to attempt to discover such information as a part of a "reasonable effort?"

The requirement that a CLEO make a "reasonable effort" imposes a substantial burden.[1] Until the advent of the permanent system, this substantial burden, reviewing the backgrounds of three to four million handgun purchases per year, will continue to fall upon the shoulders of local law enforcement officers.

The burden is made more substantial by the fact that a law enforcement officer who does not perform the duties imposed by the Brady Law faces criminal penalties. It is true that the record contains a memorandum from the Office of Legal Counsel at the Justice Department, issued March 16, 1994, in which the Assistant Attorney General expresses the view that the criminal sanctions of 18 U.S.C. §924(a)(5) were not meant to apply to CLEOs. We are not assured. This memorandum is only an opinion *to* the Attorney General, not one *of* the Attorney General. It is advisory only, and binds no one. It can be revised or retracted at any time.

In the Old Testament there is the story of Joseph, who became the Prime Minister of the Pharaoh, and whose people

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[1] Interestingly, when Congress was considering the Brady Bill, it was suggested that Federal Agents might perform the background checks. This was rejected because it would have been too burdensome upon the Federal Agents. H.R. Rep. No. 103-344, 103rd Cong., 1st. Sess., at 7 (1993).

prospered in Egypt. Then, as it says in Exodus 1:8, "(t)here arose a new king in Egypt who knew not Joseph." If LEAA members can place any confidence in the claim that they are not subject to criminal penalties, they can only do so until there is "a new king in Egypt," that is, until there is some change, either a change of heart or a change in personnel, at the Department of Justice, after which law enforcement officers would again be subject to the criminal penalties provided in the Act.

Such revision has happened in the past. This Act will be administered the Bureau of Alcohol, Tobacco and Firearms (BATF). Congress has documented the fact that these officials have been known to announce that an action was legal, and then prosecute the same act following a "change of management."[2] The memorandum gives us no assurance that

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[2] "The Constitution Subcommittee also received evidence that the Bureau has formulated a requirement, of which dealers were not informed, that requires a dealer to keep official records of sales even from his private collection. BATF has gone farther than merely failing to publish this requirement. At one point, even as it was prosecuting a dealer on this charge (admitting that he had no criminal intent) the Director of the Bureau wrote Senator S.I. Hayakawa to indicate there was no such legal requirement and that it was completely lawful for a dealer to sell from his collection without recording it." Subcomm. on the Constitution, Sen. Judiciary Comm., The Right to Keep and Bear Arms 97th Cong.2d Sess. at 22 (1982). The case referred to is documented at Hearings on S. 1030 before the Senate Judiciary Comm, 97th Cong. 2d Sess. at 60-62 (1982); one director of the prosecuting agency opined that the questioned conduct was and had always been legal; his replacement, in a statement filed with the court, avowed that this was a mistake.

LEAA members would not be subject to criminal prosecution.[3]

In the event of future prosecutions, we note that the performance commanded by the statute, "a reasonable effort," is nowhere defined. The sworn members of LEAA may, at any time, be asked to perform as the "designee" of a Chief Law Enforcement Officer. Thus, our members would be subject to prosecution for knowingly violating an unknowable standard.

Finally, if the memorandum is correct, LEAA members may face *greater*, not lesser, legal jeopardy. If the special penalty clause of 18 U.S.C. §924(a)(5) does not apply, then a violation of 18 U.S.C. §922(s) is punishable under 18 U.S.C. §924(a)(1)(D)(Supp. 1992), the "catchall" clause which provides felony sanctions for anyone who "willfully violates any other provision of this chapter."

Some CLEO's do not object to this burden. Others, such as the Appellants in this case, do object. The Law Enforcement Alliance of America, with its 50,000 members, supports the position taken by the Appellants in this litigation. In our view, whatever the merits or demerits of background checks, Congress has no constitutional authority to place this burden upon state and local law enforcement officers.

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[3] In any case, the Office of Legal Counsel has overlooked the legislative history. In fact, proposals to make the background check *optional* for CLEOs were considered and *rejected* in both the Subcommittee on Crime and the House Judiciary Committee. Congress' rejection of the amendment makes no sense unless the result was intended to mean exactly what it says: CLEOs must carry out the program or risk sanctions. We cannot safely assume that future officials will overlook the statutory history.

ARGUMENT

I

THE BURDEN WHICH THE BRADY LAW IMPOSES UPON CHIEF LAW ENFORCEMENT OFFICERS VIOLATES THE PRINCIPLES OF FEDERALISM

A Member of the British Parliament, writing of the U.S. Constitution, during the last century, observed:

> ". . . the men of 1787, feeling the cardinal importance of anticipating and avoiding occasions of collision, sought to accomplish their object by the concurrent application of two devices. One was to restrict the functions of the National government to the irreducible minimum of functions absolutely needed for the national welfare, so that everything else should be left to the States. The other was to give that government, so far as those functions extended, a direct and immediate relation to the citizens, so that it should act on them not through the States but of its own authority and by its own officers.

J. Bryce, 1 *The American Commonwealth*, (1888), at 318.

As this Court noted in *New York v. United States*, 120 L. Ed.2d 120 (1992), there were proposals in the Constitutional Convention to have federal law "carried into execution by the judiciary and executive officers of the respective states," but these proposals were rejected. *Id.*, at 143. Madison announced that the practicality of having federal laws bind "the states as political bodies, has been exploded on all hands." *Id.*

The Convention instead opted for independent sovereigns with parallel lines of authority to the individual. To Congress went limited powers, backed by the Supremacy Clause, within their sphere. To the states were reserved all other powers, to the extent they did not conflict with the limited national ones.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people....

The Federalist No. 45 (Madison) at 292-93 (C. Rossiter, ed. 1961).

Behind this division lay not only practical judgments, but a good deal of history. A central precept of Anglo-American political thought had long been that sovereignty was indivisible. A nation-state had but one repository of the sovereign power. Within the nation-state one was either the sovereign or a subordinate, no person or entity might be both. *See,* C. Rossiter, *The Political Thought of the American Revolution*, ch. 10 (1963). To speak of a subordinate sovereign, a ruling power within a ruling power, an *imperium in imperio*, was to display political ignorance. *See,* B. Bailyn, *The Ideological Origins of the American Revolution*, (1967), at 198-229.

The way to sidestep this barrier lay in the concept, derived from Locke and implicit in pre-Revolutionary American thought, of the people themselves as the ultimate repository of *imperium*. E. Morgan, "The American Revolution Considered as an Ideological Movement," in *Causes and Consequences of the American Revolution*, 172, 178-79, (1966). The people might then divide their *imperium* among two units of government, provided that each had a distinct responsibility. "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes." *Federalist No. 46* (Madison) at 294 (C. Rossiter, ed. 1961). To this theoretical base the Framers added practical counsel: to expect one sovereign to govern another is to invite conflict and chaos. Hamilton thus stressed the ability of the federal system to overcome both theoretical limitations and practical risks, by having each sovereign govern individuals:

> [A] sovereignty over sovereigns, a government over government, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity, by substituting violence in place of the mild and salutary coercion of the magistrate.

Federalist No. 20, at 138.

The leaders of the early Republic knew and grasped these distinctions. In the Ninth Circuit, Respondents and their *amici* attempted to assert historical precedent contradicting the clear results of 1787. *See* Brief for the United States, *Mack v. United States*, at 14*ff*. Their invocations, placed in correct historical context, fail to support their claims, which this Court in any event rejected in *New York*. It is no accident that the bulk of their claims arise from proposals for collection of

revenue, and none involve the commerce power. During the debates of 1787-88, the power over revenue was one of the most confused areas of discourse. Congress had, of course, the power to raise money; most envisioned that the bulk of its funding would come from customs levies; few had any clear idea of what laws the Congress might choose to enact if these proved insufficient. The debate was thus exceptionally prone to lapse into speculation and hypothetical fears. Moreover, the proposed Constitution itself did seem to envision that any direct tax needs would be apportioned out to the states: Art. I, §9 provided that "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken."

In *The Federalist No. 45,* at 292, Madison mentions the possibility that State officers might be used to collect federal taxes. The context however, shows that Madison has in mind the possibility of federal authorities simply asking states to contribute their quota of the federal needs, and subsequently using their own officers to collect any shortfall.

Madison envisions a system where the first recourse would be to excises; the second to "quotas" of tax figures apportioned among the states and remitted by them; the third a special state levy or surcharge on behalf of the federal government. The national government has the power to collecting internal taxes, he informs his readers, but it

> ....is probable that this power will not be resorted to, except for supplemental purposes of revenue; that an option will then be given to the states to supply their quota by previous collections of their own; and that the eventual collection, under the immediate authority of the Union, will generally be made by their own

> officers, and according to the rules, appointed by the several States.

Id. at 292. Madison continues that, in the event these additional collections are needed, it might be advisable (in modern terms) to "cross-deputize" the officers: thus state officials may be "clothed with the corresponding authority of the Union." *Id.* Such deputization would, of course, be a *grant* of federal power to willing deputies, not a *conscription* of state power; there is nothing in Madison which suggests that he envisioned the state officials being involuntarily enrolled. Indeed, conscription would be inconsistent with the central theme of *No. 45*, which is the *limitation* of federal power vis-a-vis that of the states, and the allaying of fears of an overwhelming national government.

In *Federalist No. 36*, Hamilton joins his voice to that of Madison: federal internal taxes are unlikely; if imposed, they would best be imposed on items not taxed by states. Critics of the Constitution have, however, argued that a federal property tax might be levied, and submitted that the federal government could hardly have the local knowledge necessary to value realty: that requires "knowledge of local details" and must be set by "discreet persons in the character of commissioners of assessors." *Id.* at 219-220. In that unlikely event, Hamilton responds, there is a "practical expedient:" Congress might employ state assessors as its agents:

> In other cases, the probability is that the United States will either wholly abstain from the objects pre-occupied for local purposes, or will make use of the State officers and State regulations for collecting the additional imposition. This will best answer the views of revenue, because it will save expence in the

> collection, and will best avoid any occasion of disgust to the State governments and to the people.

Id. at 221-222. Hamilton nowhere proposes that the state officials be conscripted: that would hardly avoid "any occasion of disgust to the State governments." Rather, he suggests that the state assessors be attached "to the Union by an accumulation of the emoluments." *Id.*, at 222.

Today, the concept of state officials sharing part time federal work seems anomalous. It was not so in the 18th century, when government work at all levels was largely part time. John Jay served the United States simultaneously as Chief Justice and as Ambassador to Great Britain, Oliver Ellsworth as Chief Justice and Ambassador to France, John Marshall as Chief Justice and as Secretary of State, Roger Taney as Attorneys General and as Secretary of War. B. Schwartz, *A History of the Supreme Court*, (1993) 27-28, 73.

Dual, part-time employment was in fact attempted in the early Republic, as evidenced by the protests of some states against the voluntary hiring of their officials. *See, generally*, D. Matteson, *The Organization of the Government Under the Constitution*, 296-303 (1943, reprinted 1970). During the First Congress, Virginia voted to prohibit state officials from simultaneously holding federal jobs, and Connecticut's legislature voted to oust Jedediah Huntington from the office of treasury because he had been appointed federal collector of the port of New London, *Id.* at 296-97, 300.

Other states were less particular. In New Hampshire, Governor John Sullivan served simultaneously as federal district judge. New York's district judge served also as state judge and state senator. *Id.* at 299, 303. Congress made no

response to State prohibitions, although Madison privately complained that enforcement of the Revenue Act was being retarded by the Virginia statute. *Id.* at 297. The thought of conscripting state employees rather than hiring them did not occur to Madison nor, so far as our records reflect, to any other legislator. Voluntary employment, and that with the concurrence of the state, was the avenue pursued.

Respondent additionally invoked certain enactments of the early Republic requiring state court clerks to record petitions for naturalization and provide certificates reflecting the same. Brief for the United States at 15-16. Again, this must be placed in historical context. Naturalization was initially a state affair; the Framers were concerned by the disparate systems and standards used in various states to naturalize citizens. *See, Federalist No. 42* (Madison) at 269-70. The response was creation of a Congressional power to "establish a uniform rule of naturalization," Art. I, §8. Providing for uniform procedures to be followed was simply an effectuation of this express grant of power.

It may in any event be observed, with regard to Respondent's statutory citations, that enactment of a statute does not prove its constitutionality.[4] An early Court -- in an opinion written by John Marshall's successor -- noted that the States had often assisted in Federal administration as a matter of comity, not coercion. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 108-09 (1861) ("It is true that in the early days of the Government, Congress relied with confidence upon the

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[4] If it did, *quaere* the effect of enactment of the Alien and Sedition Act.

cooperation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, upon principles of comity ... where no such duty was imposed by the Constitution.")[5]. In particular, use of state courts to process naturalizations ceased when the states began to object.[6] That States voluntarily aided the new government should not be read as a waiver of their right to object should it, centuries later, proclaim them its serfs.

Strangely, the United States also cited as precedent the enactment of the Fugitive Slave Acts, *Brief of the United States* at 16, n.13. Apart from the fact that these were enacted pursuant to a specific grant of authority over states, Art. IV, §2, they are hardly a model of cooperative federalism. The conflict over these enactments did much to bring on exactly the internecine conflict which Madison had hoped to avoid; they are today, like other legislation of the period, "a mere preamble--a title page to a great tragic volume." C.F. Adams, ed., 4 *Memoirs of John Quincy Adams* 502 (1876).

The early Republic, like its Framers, claimed no power to conscript state officials, nor to command their acts save in

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[5] *Dennison*'s result was of course overruled in *Puerto Rico v. Branstad*, 483 U.S. 219 (1987). This has no effect on the Court's observations of the voluntary nature of state compliance in the early days of the nation.

[6] "...the naturalization act of March 26, 1790, gave state judges jurisdiction over its operation, though the citizenship conferred was federal. Later, in some states the state courts were forbidden to act in the matter and the courts decided that the prohibition was within the power of the state legislatures." Matteson, *supra*, at 296.

the rare cases where the Constitution expressly required them to follow federal standards.

II
THE BURDEN WHICH THE BRADY LAW IMPOSES UPON CHIEF LAW ENFORCEMENT OFFICERS VIOLATES THE 10TH AMENDMENT

Joseph Story made the following observation regarding the limitations to the powers of the Federal government:

> The Government of the United States is one of limited powers; and no authority exists beyond the prescribed limits, marked out in the instrument itself. Whatever powers are not granted, necessarily belong to the respective States, or to the people of the respective states, if they have not been confided by them to the State Governments.

J. Story, *A Familiar Exposition of the Constitution of the United States*, (1840), at 216.

Citizens of the United States owe allegiance to two sovereigns, the state of their residence, and the United States. The powers of the two sovereigns are different, but they are not necessarily in conflict. Chief Justice Waite, in *United States v. Cruikshank*, 94 U.S. 542 (1875), at 550, said that the powers of the Federal government "...are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States, but beyond, it has no existence."

The power to regulate the sale of firearms, if Congress has such a power, must be found in the power to regulate

interstate commerce. Article I, section 8 of the Constitution gives Congress the power "(t)o regulate Commerce with foreign Nations, and among the several States..." This is a plenary power which may extend to matters purely intrastate, and may even preempt explicit state law. See, e.g., *Fry v. United States*, 421 U.S. 542, 547 (1975); *Heart of Atlanta Hotel v. United States*, 379 U.S. 241, 262 (1964). However, the Constitution places limits upon this plenary power. See, e.g. *United States v. Jackson*, 390 U.S. 570 (1968).

Justice O'Connor, in *New York v. United States*, 120 L. Ed.2d 120 (1992), clearly defines those limits. The issue was an act regulating nuclear wastes. The act provides incentives to encourage states to perform certain functions relating to nuclear waste disposal. Justice O'Connor found no fault with these provisions. The act also provided that a state must either enact legislation which is congruent with, and complementary to, Federal regulation of nuclear wastes, or take title to all nuclear wastes generated within the state. Justice O'Connor found that this provision exceeded the limits of the authority conferred upon Congress by the Constitution. Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two.

Id., at 150.

In this case, the States are presented with a choice: either enact legislation establishing an "instant check," or allocate police resources to make a "reasonable effort to ascertain...". The fact that the statute only compels individual CLEOs, rather than the state government, is irrelevant. If this construction were permitted, Congress could evade the decision

in *New York*, supra, by commanding individual members of the legislature, rather than the legislature as a whole. The Brady Act commands: either enact legislation, or implement Federal legislation. By doing so, it exceeds the limits of the authority of Congress.

The Court of Appeals for the Fifth Circuit, in *Koog v. U.S.*, 79 F. 3d 452 (5th Cir. 1996), held that the Brady Law, to the extent that it compels Chief Law Enforcement Officers to perform ministerial duties, is unconstitutional. The Fifth Circuit based its decision on the decision of this Court in *New York v. U.S.*, 120 L. Ed.2d 120 (1992), which, it said, was ". . . central to the question before us." *New York* is also central to this case.

In *New York* the issue was a challenge to the Low-Level Radioactive Waste Amendments of 1985. This statute provided several incentives to induce States to conform with the directives of the federal government on the disposal of nuclear wastes. The Act offered financial grants to States which complied. It provided for federal pre-emption in instances in which a State chose not to comply. This Court found that these provisions were within the permissible powers of Congress, and did not transgress the powers reserved under the 10th Amendment.

The Act also provided that States could choose whether to enact regulations, as prescribed by Congress, or take title to the waste from the parties who generated it, and assume liability both for the disposal of such wastes, and for any damages. This provision was found to lie outside of the enumerated powers and to be inconsistent with the Tenth Amendment.

In reaching this decision, this Court distinguished those

Tenth Amendment cases in which the issue was the authority of Congress to subject state governments to generally applicable laws. These cases include *Garcia v. San Antonio Metropolitan Transit Authority*, 469 US.. 528 (1985)(Fair Labor Standards Act); *Fry v. U.S.*, 421 U.S. 542 (1975)(wage stabilization), and *South Carolina v. Baker*, 485 U.S. 505 (1988)(tax exemption on the interest on municipal bonds). *Id.*, at 140. The Court found these cases inapposite since the legislation at issue, in *New York*, was not applicable to private parties. Instead the issue was ". . .the circumstances under which Congress may use the States as implements of regulation." *Id.*

The Court began its analysis by observing that "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.*, citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, at 288 (1981).

Congress may, however, use a variety of means to induce states to assist in regulatory programs. For example, under the spending power, "Congress may attach conditions to the receipt of federal funds." *Id.* Or Congress may offer States the choice of regulating in accordance with Congressional wishes, or having State regulation pre-empted by federal regulation. *Id.*, at 144-145.

In *Hodel*, and in *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982) (FERC), there were incentives offered to the States for undertaking certain regulatory programs. There was also the option of federal pre-emption if the States chose not to act. In neither case were the States compelled to enact legislation, nor to promulgate

regulations. In fact, the court observed, ". . . this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Id.*

Such a command is not permissible because the power of the national government operates directly upon the people, not on the States.

> In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority . . . to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.
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> * * *
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> The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce. *Id.*, at 144.

After explaining the principles to be applied in construing the Tenth Amendment, the Court then addressed the arguments of the Government in defense of the "take title" provisions, and against the prohibition on such legislation.

First, the Government argued that this prohibition can be overcome if the federal interest is important enough. The Court responded:

> No matter how powerful the federal interest

> involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents. *Id.*, at 152.

The Government also argued that ". . . the Constitution does, in some circumstances, permit federal directives to state governments." The Court responded that "(v)arious cases are cited for this proposition but none support it." *Id.*

The Brady law compels State officers (Chief Law Enforcement Officers, or "CLEOs") to perform a background investigation of potential handgun purchasers, then either to destroy the records of the investigation if the result is negative, or furnish, if requested, a written explanation if the potential purchaser appears to be ineligible to possess a firearm. Like the "take title" provisions in *New York*, the Brady Law is a direct, and unavoidable command to state officials. Like the "take title" provisions, it violates the Tenth Amendment and exceeds the Commerce Clause powers.

III

THE BACKGROUND CHECK PROVISIONS ARE NOT SEVERABLE FROM THE REMAINING PROVISIONS OF THE ACT.

There is a presumption that the inclusion of an invalid provision, in the same section with a valid provision, indicates that the legislature intended that if the one cannot be given effect, that the other should also fail. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

As is noted in footnote 3, supra, there was an attempt to make the background check, by the CLEO, optional, and the Congress rejected this. Thus, the waiting period and the background check were considered inseparable by the Congress. Further, the waiting period, without the background check, was offered to each successive Congress for many years. In each case, the bill was rejected. The legislature intended that the waiting period accompany, and facilitate, a background check. The two should fail together.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit Court, find the Brady law unconstitutional, and that the background check provisions are not severable from the remaining provisions of the Act.

Respectfully Submitted,
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